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PROSPECTIVE DAMAGES TO REALTY—SUCCESSIVE  
ACTIONS OR SINGLE ACTION.

QUESTION STATED.—The question when a man may recover compensation for damages which he has not suffered, but is likely to suffer by reason of the acts of another, is one of considerable nicety. The question has a special importance with reference to damages to realty, likely to be caused by the construction of railways or public works.

So far as the present discussion relates to public works it does not directly deal with the right to compensation for incidental damages, but is limited to the *measure of damages* and *time of recovery*.

Unnecessary damages, caused by negligent and unskilful construction of public works present an important phase of the question, and it is illustrated generally by the whole range of torts to realty springing from causes operating from adjacent realty.

In the recent cases of the *Chicago & Eastern Illinois Rd. v. Loeb*, 8 N. E. R. 460; and *Baldwin v. Chicago, Milwaukee & St. Paul Rd.*, 29 N. W. R. 5, the rule is adopted that the damages, present and prospective, must all be recovered in one action. In *Uline v. New York Central & Hudson River Rd.*, 4 N. E. R. 536, 23 A. & E. Rd. Cases 3, the opposite rule, viz.: Of successive actions for damages up to the date of bringing suit is enunciated in an opinion of great force, but in the same case *DANFORTH*, J., filed a vigorous dissenting opinion.

**GENERAL RULE OF LAW.**—The general rule as to prospective damages as stated by Mr. Mayne, is, that damages arising subsequent to action brought, or even to the date of the verdict, may be taken into consideration, when they are the natural and necessary result of the act complained of and do not themselves constitute a new cause of action : Mayne's Law of Damages (3d ed.) 84.

This rule is clearly correct upon principle and is plainly deducible from the decisions. The difficulty is in the application.

Without attempting to harmonize all the cases, I shall endeavor to indicate the principles which I believe are recognised by the greater weight of authority, and which if fairly applied would remove most of the confusion from the decisions. The plain distinction of fact between cases of *trespass* and cases of *no trespass* has been overlooked in most of the decisions. It has been assumed that the time of recovery and measure of damages would be the same in both, and trespass cases have been cited as authorities in actions for nuisances, and *vice versa*. Again, the fact that a tort beginning with a trespass has created a *continuing nuisance*, has frequently been overlooked.

In such a case the question to be decided in order to determine what rule of damages shall apply is, in what class of torts shall it be placed ? Shall it be treated as a trespass or as a continuing nuisance ? It has the features of both—to which class shall it be assigned ?

In brief, the rule as to prospective damages does not lead to the same result in all cases of torts to realty ; but there are classes of torts to realty upon which the foregoing rule operates variously and in applying the rule the first thing to do is to classify the tort.

**CLASSIFICATION OF TORTS TO REALTY.**—For the sake of clearness I summarize here the classification of these torts, with the rules of damages therefor, into which I believe the mass of the decisions will actually fall, thus :

I. Single Nuisances and Acts Wrongful only when Causing Actual Damage.

Rule of Damages—Damages computed to Date of Beginning Action.

II. Continuing Nuisances.

Rule of Damages—Successive Actions with Recovery to Date of Beginning Action.

III. Trespasses.

Rule of Damages—One Action for all Damages, Past, Present and Prospective.

**IV. Trespasses Causing Continuing Nuisances.**

Rule of Damages—Successive Actions with Recovery to Date of Beginning Action.

**V. Permanent Injuries for Torts to Realty other than Trespasses.**

Rule of Damages—One Action for all Damages, Past, Present and Prospective.

There is no inherent reason why the rule as to prospective damages should produce the same results when applied to cases differing so widely in their facts as those in these five classes, and nothing is more certain than that the rule as applied by the courts has not operated with uniform result. But the natural diversity in result has, I believe, been greatly increased and confused by an ignoring of the fundamental differences in the classes—and the greatest success in harmonizing the decisions has been secured by observing the differences between these classes.

**I. SINGLE NUISANCES AND ACTS WRONGFUL ONLY WHEN CAUSING ACTUAL DAMAGE.**—In cases falling within this class, *i. e.*, where the *gravamen* of the action is the damage inflicted, the recovery is limited to such damages as have accrued prior to the date of beginning the action, and any subsequent damage must be recovered in a separate action when it has in fact accrued: *Robinson v. Bland*, per MANSFIELD, Ld. C. J., 2 Burr. 1077; *Whitehouse v. Fellowes*, 10 C. B. N. S. 765; *Nicklin v. Williams*, 10 Ex. 259; *Bonomi v. Backhouse*, E. B. & E. 622; s. c. 9 H. L. C. 503; *Rosewell v. Prior*, 2 Salk. 460; *Battishill v. Reed*, 18 C. B. 696; *Bankart v. Houghton*, 28 L. J. Ch. 473; *Lamb v. Walker*, 3 Q. B. Div. 389 (dissenting opinion of COCKBURN, C. J.); *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125; 24 Am. L. Reg. (N. S.) 432, overruling *Lamb v. Walker*, *supra*, and adopting COCKBURN'S dissenting opinion; *Del. & Raritan Canal Co. v. Wright*, 21 N. J. L. 469; *Waggoner v. Jermaine*, 3 Denio 306; *Baldwin v. Calkins*, 10 Wend. 167, 179; *Phillips v. Terry*, 3 Keyes 313; *Whitemore v. Bischoff*, 5 Hun 176; *Duryea v. Mayor*, 26 Id. 120; *Beckwith v. Griswold*, 29 Barb. 291; *Thayer v. Brooks*, 17 Ohio 489; *Polly v. McCall*, 1 Ala. Sel. Cas. 246; s. c. 37 Ala. 20; *Stein v. Burden*, 24 Id. 130; *Savannah Canal Co. v. Bourquin*, 51 Ga. 378; *Shaw v. Etheridge*, 3 Jones (N. C.) 300; *Burnett v. Nicholson*, 86 N. C. 99; *Duncan v. Markley*, 1 Harper (S. C.) 276; *Langford v. Owesley*, 2 Bibb (Ky.) 215; *Cobb v. Smith*, 38 Wis. 21; *Hazletine v. Case*, 46 Id. 391; *Clark v. Nevada Mining Co.*, 6 Nev. 203;

*Hodges v. Hodges*, 5 Metc. 205; *McConnel v. Kibbe*, 29 Ill. 483; *McConnel v. Kibbe* (second action: opinion per BECKWITH, J.), 33 Id. 175.

In *Whitehouse v. Fellowes*, 10 C. B. N. S. 765, the trustees of a pike road had covered over an open ditch at the side of their road, and converted it into an enclosed drain. In times of freshet and heavy rains this drain proved insufficient to carry away the water, and so caused it to overflow plaintiff's lands. WILLIAMS, J., said: "In considering the first point I assume that an injurious act was done to the plaintiff, by reason of the defendant's *improper management* of the catch-pits, whereby the water which ought to have passed down the drain was caused to flow into the plaintiff's pits. The question is whether the plaintiff is bound to rest his complaint upon the original construction of the works, or whether he can maintain an action after the expiration of three months from that time (which was the period of the special statute of limitation applicable thereto). "I am of opinion that the continuance by the defendant of that negligent and improper condition of the road under their charge, if accompanied by fresh damage to the plaintiff, constitutes a fresh cause of action." "Suppose an action to have been commenced immediately after the first injury accrued to the plaintiff's pits from the flow of water down the road in question; when that cause came to be tried, the only question would be how much damage the plaintiff had actually sustained. It would be monstrous injustice to hold that the jury must *assume that the defendants would persevere* in their wrongful conduct, and that the damages must be assessed upon that assumption. All that the jury could do would be to find what damages the plaintiff had sustained from the wrongful act complained of, and they would be told to give him such damages as they might find he had sustained, down to the time of the commencement of the action."

In *Lamb v. Walker*, 3 Q. B. Div. 389, which was a case of excavation upon his own land, in consequence of which there was a subsidence of plaintiff's land and damage done to his building by the loss of support, and a further subsidence seemed to impend. COCKBURN, in his dissenting opinion, said: "The fundamental principle on which the decision in *Backhouse v. Bonomi*, proceeds is, that no cause of action arises in respect of what a man does on his own land, until actual damage arises therefrom to the property of the adjoining owner. According to that decision, there is no

abstract right of support independent of acquired easement, from adjacent strata, and the removal of such strata constitutes in itself no wrong. No wrong arises to A. from the excavation of B., on his own soil, though the stability of A.'s adjoining land may be thereby endangered, unless and until A. sustains actual damage therefrom." And he quotes WILLES, J.'s opinion in that case: "The law favors the right of dominion by every one upon his own land and his using it for the most beneficial purpose to himself." He insists at some length upon the ability of the defendant to supply artificial support and thereby prevent any further subsidence and further damage. This is in reality the affirmation that the condition of affairs after the first subsidence is *temporary* and may be changed, which is the same consideration which is brought forward by WILLIAMS, J., in *Whitehouse v. Fellowes*. After speaking of the difficulty of determining future damages, he concludes: "Moreover this inconvenience would be seriously aggravated by the fact that whenever appreciable damage had resulted, however limited its extent, a plaintiff would be compelled not only to bring his action, though he might think the damage not sufficient to make it worth while to enter into litigation, but also to go into the whole question of speculative future damage, lest he should be barred by the Statute of Limitations in respect of future damage, however serious, which might accrue after the expiration of the statutory period."

This reasoning is adopted and the opinion of the majority overruled in *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125, 24 Am. L. Reg. (N. S.) 432, and BRETT, M. R., and BOWEN and FRY, LL.JJ., repeat and reinforce these distinctions in extended opinions.

This rule limiting the damages from an act wrongful only by reason of damages, to the damages accrued when suit was brought, applies to cases where the acts causing the damages complained of are interrupted and repeated, where temporary flash boards are erected on a dam from time to time, or damages are caused by the occasional opening of the gates of a dam: *Noyes v. Stillman*, 24 Conn. 15, and to cases where from one act not wrongful in itself successive damages are caused at different times, as in the excavation cases, *supra*; or where, by erecting a temporary obstruction in a stream, water is from time to time diverted from the riparian owner below. *Beckwith v. Griswold*, 29 Barb. 291.

II. CONTINUING NUISANCES.—Here the rule is familiar that every continuance of a nuisance is a new nuisance, for which a fresh action is maintainable; and it is the simplest application of the general rule as to prospective damages that they are not recoverable in such cases. The recovery in each action is limited to damages accrued prior to the date of the action: *Beswick v. Combdon*, T. Moore 353; *Cro. Eliz.* 402; *Penruddock's Case*, 5 Co. Rep. 205; 3 Bl. Com. 220; *Rosewell v. Prior*, 2 Salk. 460; *Fay v. Prentice*, 1 C. B. 828; *Bowyer v. Cook*, 4 Id. 236; *Holmes v. Wilson*, 10 Ad. & El. 503; *Thompson v. Gibson*, 7 M. & W. 456; *McConnell v. Kibbe*, 29 Ill. 482; *Same v. Same*, second action, 33 Id. 175; *Staple v. Spring*, 10 Mass. 72; *Hodges v. Hodges*, 5 Met. 205; *Baldwin v. Calkins*, 10 Wend. 167; *Beidelman v. Foulk*, 5 Watts 308; *Blunt v. McCormick*, 3 Denio 283; *Cumberland, &c., Corp. v. Hitchings*, 65 Me. v. 140; *Thayer Brooks*, 17 Ohio 489; *Beach v. Crain*, 2 N. Y. 86; 1 Sutherland, Damages 202; Gould on Waters, sect. 387.

As was said by BECKWITH, J., in *McConnell v. Kibbe*, 33 Ill. 175, “Successive suits for actual damages may be brought from time to time as the damages are sustained, and in each suit the party may recover such damages as he has sustained prior to its commencement, not barred by a previous recovery.”

EXEMPLARY DAMAGES.—If a person continues a nuisance after it has been adjudged to be wrongful and damages have been awarded against him, the case is one for exemplary damages. Blackstone ventured this opinion in the absence of authority (3 Bl. Com. 220), saying “Indeed every continuance of a nuisance is held to be a fresh one (2 Leon. pl. 129, Cro. Eliz. 402), and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. “Since then this opinion has become law by the force of repeated decisions. *Deberry's Case*, 1 Hayw. (N. Car.) 248; *Carruthers v. Tillman*, 1 Id. 501; *Clyde v. Clyde*, 1 Yeates (Pa.) 92; *Walker v. Butz*, Id. 574; *Mayor v. Com'rs*, 7 Penn. St. 348, 366; *Wheatley v. Chrisman*, 24 Id. 298. In *Battishill v. Reed*, 18 C. B. 696, JERVIS, C. J., said: “Every day that the defendant continues the nuisance he renders himself liable to another action. I think the jury did right to give as they generally do, nominal damages only in the first action; and, if the defendant persists in

continuing the nuisance, then they may give such damages as may compel him to abate it, but not as was insisted here, the difference between the original value of the premises and their diminished value."

For a decision authorizing punitive damages in case of injury to land by unauthorized *trespass* and *entry* in the course of constructing a railroad: See *Anderson, &c., Rd. v. Kernodle*, 54 Ind. 314.

III. TRESPASS.—In case of trespass, the act complained of is a direct injury in itself and the damages are merely consequential. There is not a new wrong when new damages accrue, and therefore no new cause of action. The plaintiff must therefore recover the entire damages from a trespass in a single action: *Kansas Ry. v. Mihlman*, 17 Kan. 224; *Fetter v. Beale*, 1 Salk. 77; *Oakley v. Kensington Canal Co.*, 5 B. & Ald. 138; *Clegg v. Dearden*, 12 Q. B. 575; *Vedder v. Vedder*, 1 Den. 257; *White v. Mosely*, 8 Pick. 356; *Dickinson v. Boyle*, 17 Id. 78; *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583; *Dick v. Webster*, 6 Wis. 481; *Marshall v. Ulleswater Steam Navigation Co.*, L. R., 7 Q. B. 166.

This rule and the reasons therefor apply with added force to the cases of trespasses causing permanent injury.

In *Fetter v. Beale*, 1 Salk. 11, where a plaintiff, who had recovered in a former action for assault and battery, brought a fresh action upon another piece of his skull coming out, Lord HOLT compressed the rule, the distinction and the reason into an opinion of but one sentence, which has become classic. He said, "Every new dropping is a new nuisance, but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of damages, which the jury must be supposed to have considered at the trial."

In *Kansas Ry. v. Mihlman*, 17 Kan. 224, the defendant had entered upon the plaintiff's land and dug a trench thereon, diverting waters from their natural channel and causing them to overflow the plaintiff's land. It was held that the trespass itself constituted the invasion of the plaintiff's rights, and that the cause of action was complete. BREWER, J., said: "So far as the company had acted, its action was finished when it had dug the ditches (we are now considering the question with reference solely to what it did off its own land, and upon that of Mihlman). It had invaded Mihlman's rights; it had committed a trespass on his lands. It was then responsible in an action for the injury it had done by that trespass.

Such action might have been brought immediately, and in such action could have been recovered all damages done to Mihlman by the trespass, and which might have included the cost of restoring the ground to the condition it was before the digging of the ditches. What new act has the company since done? What wrong has it done to Mihlman's property? Nothing. Its hands have been still. It has made no new invasion of his rights. \* \* \* Suppose an action had been brought and damages recovered for the trespass immediately after it accrued; what new act of the company could now be alleged as the basis of the recovery? True the trespass has now resulted in greater loss than was then foreseen or estimated in assessment of damages; but an increase in the damages resulting adds no new cause of action." After stating *Fetter v. Beale*, cited above, and citing other cases, he proceeds, "so far the trespass, the cause of action is complete at the time, and an increase in the resulting damages gives no new cause of action. There are cases it is true in which the cause of action is based upon the actual occurrence of damages and dates therefrom, and not upon or from the prior act which resulted in the damage; but these are all cases in which the prior act is itself lawful, and furnishes no cause of action, or where it is considered as a continuing act; as, where one excavates on his own land, and thereby withdraws the lateral support to his neighbor's soil and buildings, the act is itself lawful, and only becomes the basis of a cause of action for damages when it actually results in injury: and the cause of action dates not from the time of the excavation, but from the time of the subsidence. *Bonomi v. Backhouse*, 96 Eng. Com. L. 653. Here no trespass is committed. The party is simply using his own property, and using it lawfully; and it is only when he conflicts with the rule, *sic utere tuo ut alienum non laedas*, that his neighbor has any cause of complaint. \* \* \* Other cases might be cited, but enough have been to show the principle which underlies them, namely, that where the original act itself is no invasion of the plaintiff's rights, then there is no cause of action until such act has caused damage, and the right of action dates from that time. On the other hand, as we have already stated, where the original act is unlawful, and an invasion of the plaintiff's rights, the cause of action dates from that act, and a new cause of action does not arise from new damage resulting therefrom. The case of *Lord Oakley v. Kensington Canal Co.*, 5 Barn. & Ald. 138, is strongly in point. The canal company entered

upon plaintiff's land and dug it away for the purpose of stopping the banks of their canal, in consequence of which the land was overflowed at every high-tide. It was held that the injury was complete when the trespass was committed, and that no new cause of action arose with every overflow. So in the case of *Clegg v. Dearden*, 12 Q. B. 575, the defendant made an excavation into the mine of plaintiff, through which water flowed into the mine. It was held that the cause of action was complete at the time the excavation was made. Lord DENMAN, in giving the opinion of the court, says: "The gist of the action, as stated in the declaration, is the keeping open and unfilled an aperture and excavation made by the defendant into the plaintiff's mine. By the custom the defendant was entitled to excavate up to the boundary of his mine, without having any barrier, and the cause of action therefore is, the not filling up the excavation made by him on the plaintiff's side of the boundary and within their mine. It is not, as in the case of *Holmes v. Wilson*, 10 A. & E. 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiff: nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiff, as in the case of *Thompson v. Gibson*, 7 M. & W. 456. There is a legal obligation to discontinue a trespass, or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiff's land, was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation. Such an omission is neither a continuation of a trespass nor a nuisance; nor is it a breach of any legal duty."

In *Vedder v. Vedder*, 1 Denio 257, the distinction is also clearly stated. The defendant trespassed upon the land of the plaintiff, and polluted his stream by placing foul matter therein. The plaintiff afterwards gave him, for a valuable consideration, a discharge and satisfaction "of all demands to date." It was held, that such discharge extinguished all right of action, not only for the original injury and the damages up to that time, but for all future damages occasioned by the nuisance. The court say: "If the nuisance had been placed on the defendant's land, at the head of the stream, so as thereby to have proved equally injurious to the plain-

tiff, an accord and satisfaction, or a release of all demands to the 1st of June, would not have barred an action for the continuance of the nuisance after that day. Every succeeding injury after that time, would have been a new and distinct cause of action. But that is plainly distinguishable from this case."

So in *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125, which was for withdrawal of lateral support, counsel urged upon the court *Marshall v. Ulleswater Steam Navigation Co.*, L. R., 7 Q. B. 166. BOWEN, L. J., remarked: "That was an action of trespass, it does not apply to this case."

I am aware that this distinction was expressly denied in the case of *Chicago & Eastern Illinois Rd. v. Loeb*, 8 N. E. R. (Ill.) 460. But in that case the court were misled by confusing the distinction between trespass and case as actions with trespass and nuisance as torts. SHELDON, J., said: "The distinction which appellee's counsel draws in that case, that it was one of trespass, some piles in the protection of the bridge having been actually driven in Maher's land (*C. & A. Rd. v. Maher*, 91 Ill. 312), does not make a satisfactory discrimination. There is no significance in that action having been one of trespass and not case, as our statute has abolished all distinctions between the actions of trespass and trespass on the case."

The distinction insisted on is not one of *forms* of action. It is the fundamental distinction of fact between damages produced by *one cause at one time*, and by *many causes at many times*. The case illustrates the very common failure to distinguish between substantive law and remedial law, between substantive law and adjective law. The legislature have abolished the separate forms of remedy, the court infers that the distinction between different kinds of *wrongs* is also abolished.

**IV. TRESPASSES CAUSING CONTINUING NUISANCES, OR CONTINUING TRESPASSES.**—Here the rule is modified to conform to that for continuing nuisances. Each continuance is treated as a fresh wrong which will support a fresh action, and accordingly damages are limited to those accrued prior to suit for which there has been no previous recovery: *Holmes v. Wilson*, 10 A. & E. 503; Sergeant Williams in 1 Wms. Saund. 23, note 1, to *Manchester v. Vale*; *Monckton v. Pashley*, 2 Ld. Raym. 976; *Bowyer v. Cook*, 4 C. B. 236; *Battishill v. Reed*, 18 C. B. 696; *Cumberland Canal Co. v. Hitchings*, 65 Me. 140; *Russell v. Brown*, 63 Id.

203; *Esty v. Baker*, 48 Id. 495; *Savannah Canal Co. v. Bourquin*, 51 Ga. 378. In this last case the rule is so stated in a *dictum*, the case being actually one of overflowing plaintiff's lands by reason of the defendant's negligence.

The rule is *modified*, I have said, in this particular. All the consequences of the continuing trespass flow from the original invasion of the plaintiff's right, and if that alone were considered all the damages should be recovered in one action. But that wrongful act has another characteristic, viz., it creates a continuing nuisance. In *Holmes v. Wilson*, buttresses for a road were thrown out upon the plaintiff's land. In *Battishill v. Reed*, eaves were projected over the plaintiff's land. Similar to that case, all cases of trespass and nuisance by projection of eaves are *Rolfe v. Rolfe*, T. Moore 353; *Beswick v. Combdon*, Id.; s. c. cited in *Penruddock's Case*, 5 Co. Rep. 205; *Fay v. Prentice*, 1 C. B. 828; *Codman v. Evans*, 7 Allen 431; *Whitney v. Sanders*, 3 Pitts. 226; *Gould v. McKenna*, 86 Penn. St. 297; *Aiken v. Benedict*, 39 Barb. 400 (overruling *Sherry v. Frecking*, 4 Duer 452, which held that ejectment was the remedy).

In *Bowyer v. Cook*, 4 C. B. 236, the injury was by placing stumps and stakes on plaintiff's land and leaving them there. In *Canal Co. v. Hitchings*, 65 Me. 140, the action was trespass for filling up and maintaining the filling in a canal.

The character of the wrongs as presenting the features of both trespass and nuisance is evident. Sergeant Williams, in the note above cited (1 Wms. Saund. 23, n. 1, to *Manchester v. Vale*), lays down the rule strongly: "The continuing of a trespass from day to day is considered in law a several trespass on each day, and must be directly and positively answered by the defendant, as well as the original trespass."

In *Holmes v. Wilson*, the plaintiff had recovered damages for the erection of the buttresses in a former suit, and now brought an action of trespass for the wrongful continuance; Lord DENMAN, C. J., said: "The former and the present actions are for different trespasses. The former was for erecting the buttresses. This action is for continuing the buttresses so erected. The continued use of the buttresses for the support of the road, under such circumstances, was a fresh trespass."

In *Canal Co. v. Hitchings*, 65 Me. 140, the court said: "When something has been unlawfully placed upon the land of another

which can and ought to be removed, then, inasmuch as successive actions may be maintained, until the wrongdoer is compelled to remove it, the damages in such suit must be limited to the past and cannot embrace the future."

But this rule was not established without objection. In the case of *Farmers of Hampstead Water*, 12 Mod. 519, it is stated in the report, "upon executing a writ of inquiry of damages in trespass for digging a hole in the plaintiff's soil, whereby his land was over-flowed, *continuando transgressionem*, for nine months, and it was insisted that they might give evidence after the nine months, as well as in a nuisance which continues for nine months, and the cause is removed, if the effect continues afterwards" damage may be recovered for it; but Lord HOLT, C. J., said: "he was not satisfied that the parity should hold, for the gist of the action in a nuisance is the damage; and, therefore, as long as there are damages there is ground for an action, but trespass is one entire act, and the very tort is the gist of the action; and, therefore, he said he doubted whether an action would lie for the continuance of a trespass, as for that of a nuisance." Judge BREWER also objected to this phase of the rule in *Kansas Ry. v. Mihlman*, 17 Kan. 224. "At any rate," he said, "we do not think it can be extended beyond the character of trespasses there named, that is, those in which something is carried to and placed upon the land." Here he is indefinitely describing the class to which the rule does apply. The description *trespasses which create continuing nuisances*, definitively determines the class, and harmonizes the rule. The series of torts bearing this two-fold character is treated according to its leading characteristic and placed with continuing nuisances as proper ground for successive actions with recoveries limited to damages already accrued. This classification has not been fully reasoned out by the courts, but the limitations upon the rule are such as to enable us to delineate the class.

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(*To be continued.*)

